Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN - 4 1996

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of The Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	

DOCKET FILE COPY ORIGINAL

COMMENTS OF RESIDENTIAL COMMUNICATIONS NETWORK, INC.

Residential Communications Network, Inc. ("RCN") hereby submits its comments on the Commission's Order and Notice of Proposed Rulemaking released on April 9, 1996 ("NPRM") concerning implementation of the Cable Act Reform provisions of the Telecommunications Act of 1996.[1] As a new market entrant which will deliver voice, video and data services to residential subscribers, RCN has a substantial interest in the development of rules by the Commission which will encourage diverse investment in a variety of competitive network choices over which RCN may distribute its programming and provide telephone services. Just this week, the Commission has taken important steps in this regard by adopting Open Video Systems ("OVS") rules which will permit incumbent local exchange carriers ("LECs"), competitive LECs, and incumbent cable operators to develop OVS platforms for programmers

---

1 Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56, approved February 8, 1996 ("1996 Act").

like RCN to distribute programming to subscribers.[2] The instant docket will provide complementary changes to the Commission's regulation of Title VI cable operators which are required to conform to the 1996 Act.

RCN does not take a position on the proposed changes in such regulation insofar as they relate solely to the Commission's regulation of incumbent cable operators. However, in one instance, the Commission is proposing to modify Title VI for purposes of video programming distributed using a LEC transmission network in a manner which is inconsistent with the application of that Title to cable operators, and which could, therefore, discourage investment by LECs in "open" transmission systems which would be available to RCN and other programmers pursuant to the *Open Video Systems Order*. Specifically, the *Notice* proposes to adopt a quantitative Title I standard to determine whether an entity is an "affiliate" of a LEC, which definition is significantly different from the more general Title VI analysis used to determine whether an entity is an "affiliate" of an incumbent cable operator. This discrepancy would have the inevitable (and, RCN believes, unintended and inappropriate) result of skewing the Commission's rules in a manner which would substantially ease the statutory test for determining "effective competition" under the 1996 Act and thereby potentially release cable operators from rate regulation prematurely. It would also result in significant discrepancies in the obligations faced by a cable operator to provide leased access as opposed to the capacity obligations imposed on an OVS operator. In neither case is there any indication that the Congress intended different

---

[2] *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Second Report and Order, CS Docket No. 96-46, FCC Mimeo No. 96-249 (released June 3, 1996) ("*Open Video Systems Order*").

standards to apply, and indeed, where such discrepancies would serve to disincent LECs from offering an "open" transmission system and/or provide passive capital resources to video programmers, they are directly contrary to the pro-competitive purposes of the Act.

1. Effective Competition.

The 1996 Act added a new fourth test for "effective competition" upon which an incumbent cable operator may petition the Commission for relief from rate regulation.[3] The Act amended the definition of "effective competition" in this context to include competition from "a local exchange carrier or its *affiliate*" providing video programing directly to subscribers (other than direct-to-home satellite services) in the franchise area.[4] The *Notice* acknowledges that the 1996 Act in no way alters the definition of "affiliate"generally applicable to Title VI of the Act, which provides that

> the term "affiliate," when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with such person[5]

In contrast, however, the *Notice* proposes to apply the more specific, quantified definition of "affiliate" set forth in Title I of the Communications Act to all video distribution systems offered by LECs:

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common

3 See Communications Act § 623; 47 U.S.C. § 543.

4 1996 Act at § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D) (emphasis added).

5 Communications Act, §602(2); 47 U.S.C. 522(2).

> ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.[6]

If the *Notice* proposal is adopted, LECs would be subject to the low 10% ownership threshold for determining "affiliation." Therefore, under the test established by Section 623(l)(1)(D) of the Act, the presence of any competitive MVPD in which a LEC has only a passive, non-controlling 10% or greater equity investment would establish a basis for a cable operator to claim that effective competition exists in the market. Cable operators, on the other hand, would be considered "affiliated" with other entities only if control is established.[7] Accordingly, cable operators would be permitted to have a much more extensive ownership interest in a "competitive" multichannel video programming distributer ("MVPD") and still support an effective competition determination under Section 623(l)(1)(B). This use of a different definition for LEC and cable operator "affiliates" is both contrary to the intent of the *Notice* to develop "consistent" rules and, moreover, would serve to lessen the level of competition which must be shown in order to justify deregulation of the dominant incumbent cable operator.

For example, by applying the more general standard to the term "unaffiliated" as used in the second prong of the "effective competition" definition, an incumbent cable operator could

---

6 *See NPRM* at Appendix A, proposed rule §76.1401(b).

7 Cable operators would still be subject to the more generic Title VI definition of affiliation which is based on common ownership or control. This definition, has consistently been interpreted to require the establishment of either *de jure* control, (ownership of 50% or more of the entity's stock) or *de facto* control (determined by examining the level of influence exerted over the entity). *See, e.g. Metromedia, Inc.*, 98 F.C.C. 2d 300, 306 (1984) (*citing Barnes Enterprises, Inc.*, 55 F.C.C. 2d 721, 725, n. 4 (1975)).

demonstrate that its competitor for the provision of video services in its area is "unaffiliated" and therefore is an "effective" competitor even if the cable operator has an equity ownership in the other MVPD grater than 10%. On the other hand, by subjecting LECs to the 10% ownership threshold, the Commission would necessarily lower the standard for a cable company to establish that its competitor is affiliated with the LEC and therefore is an "effective" competitor. As a result, proposal is not consistent even within this single provision of Title VI.

2. Leased Access/Open Video Systems.

Cable operators would also benefit from this inconsistency between the definition of "affiliate" with respect to application of the "leased access" provisions of Title VI. Section 612 of the Communications Act requires cable operators to designate certain amount of channel capacity for commercial use by "unaffiliated" programmers.[8] This provision is designed to enhance competition by giving the consumer access to independent programming over the same infrastructure. In order to accomplish the same goal with respect to OVS systems, Congress limited the amount of channel capacity that could be controlled by an OVS operator or its affiliates where demand exceeds capacity.[9] In spite of the commonality of purpose between these provisions, they would be implemented differently under the *Notice* proposal to implement disparate definitions of affiliate. A cable operator could meet its leased access obligation by providing capacity to an entity in which it had, for example, a 35% non-

---

8 Communications Act § 612, 47 U.S.C. 532

9 Communications Act § 653, 47 U.S.C. 573

controlling equity interest.[10] However, under the different standard proposed by the *Notice*, an OVS operator providing capacity to an entity in which it had the same level and type of non-controlling interest would have to include that capacity as part of the capacity for which the operator and its "affiliates" are able to select. Consequently, cable operators will be able to maintain passive investment in "independent" programmers, while OVS operators will be penalized for doing so. There is nothing in the 1996 Act which indicates that the Congress intended for the Commission to apply a different definition of "affiliate" to LEC systems, or that it intended for a definition other than that applicable to Title VI generally to apply to Title VI LEC video platforms.

These inconsistencies could discourage investment by the LECs in MVPDs and consequently could reduce competition in the provision of video services. Moreover, in fact, the Commission has already held that Congress intended that the Title VI definition of affiliate should be applicable to all provisions of the Title.[11] RCN strongly urges the Commission to leave the statutory definition in place and to continue to define affiliate consistently throughout Title VI of the Communications Act. In addition, expanding the use of the Title I definition of "affiliate" to some, but not all, uses of the term "affiliate" in Title VI is also contrary to the policy of the 1996 Act to encourage vigorous competition. The Commission recently considered a similar issue in determining what level of foreign ownership should trigger

---

10 *See* note 7, *supra*.

11 *See* Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63-58 Notice of Proposed Rulemaking, 3 F.C.C. Rcd. 5849 (1988) (noting that the absence of the phrase "unless the context otherwise requires" that is contained in Section 3 indicates that the standard should be applied to all provisions in Title VI).

application of its "equivalent competitive opportunities" test.[12] In that proceeding the Commission specifically rejected the adoption of a 10% ownership threshold for "affiliation," stating that "[w]e do not find that the potential anti-competitive conduct addressed by a ten percent affiliation standard would justify the detrimental impact such scrutiny would have on investment in U.S. carriers" and would defeat the Commission's purpose of "facilitating foreign investments that do not erode competition."[13]

The Commission must balance similar interests here. The Conference Report for the 1996 Act notes with respect to Section 302 that

> Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options *to promote competition, to encourage investment in new technologies and to maximize consumer choice* of services that best meet their information and entertainment needs.[14]

The Commission should similarly balance the potential that a 10% investment could result in anti-competitive behavior against the possibility that the narrow definition of ownership will discourage pro-competitive investment in video distribution systems. By applying the more flexible Title VI definition of affiliate, the Commission will enable LECs to support competition through non-controlling investment in other MVPDs while retaining the Commission's ability to monitor situations where a 10% ownership gives the LEC *de facto* control that could result in anti-competitive behavior.

---

[12] *Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order*, IB Docket No. 95-22 (rel. November 30, 1995)

[13] *Id.* at 85.

[14] Conference Report at 56.

CONCLUSION

For the foregoing reasons, MFS strongly urges the Commission to adopt regulations that will encourage LEC investment in Open Video System platforms and in programming alternatives by assuring that a consistent Title VI definition of "affiliate" is applied to both LEC and incumbent cable operators.

Respectfully submitted,

RESIDENTIAL COMMUNICATIONS NETWORK, INC.

By: Jean L. Kiddoo

Jean L. Kiddoo
Karen Eisenhauer

SWIDLER & BERLIN, CHTD.
3000 K Street, N.W.
Washington, D.C. 20007
(202) 424-7834
(202) 424-7645 (fax)

Dated: June 4, 1996

161732.2